



**United States Department of the Interior
BUREAU OF LAND MANAGEMENT**

Barstow Field Office
2601 Barstow Road
Barstow, CA 92311
www.ca.blm.gov/barstow



In Reply Refer To:
4160(P)
CA-680.36

SEP 30 2004

CERTIFIED MAIL NO. 70031010000451296182
RETURN RECEIPT REQUESTED

NOTICE OF FIELD MANAGER'S PROPOSED GRAZING DECISION

William Mitchell
32322 Hinkley Rd.
Barstow, CA 92311

Dear Mr. Mitchell:

INTRODUCTION

The Rattlesnake Canyon Allotment, #8003, currently is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046803, authorizes 84 head of cattle and four horses year long, or 1044 animal unit months (AUMs) on the Rattlesnake Canyon Allotment #8003. The allotment encompasses 28,712 acres, including private, and BLM (public) lands. Public land administered by the BLM totals 26,623 acres. Within the Rattlesnake Canyon Allotment, there are 12,800 acres of non-critical habitat for the desert tortoise. The Rattlesnake Canyon Allotment is within the West Mojave planning area (currently out for public review).

BACKGROUND

In 2000, the grazing lease for the Rattlesnake Canyon Allotment expired at the end of the 1999 grazing year (2/28/00). This grazing lease was renewed under the authority of Public Law 106-113 for a duration of five years. The duration of the grazing leases renewed in 2000 varied by allotment based on factors that included rangeland health condition. The renewed grazing leases contained the same terms and conditions as the expiring grazing leases. Public Law 106-113 requires compliance with all applicable laws and regulations, which include the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Following the analysis of environmental impacts this grazing leases may be approved, canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations.

The Washington Office Instruction Memorandum (IM) 2003-071 requires that all grazing permits and leases that expired in 1999 and 2000 be “fully processed” by the end of Fiscal Year 2004 (9/30/04). The term “fully processed” permit/lease refers to the completion of an adequate environmental analysis and issuance of a proposed grazing decision in accordance with 43 CFR 4160, and appropriate consultation in accordance with the ESA.

The Bureau of Land Management (BLM) is proposing to issue a ten-year term length grazing leases for the Rattlesnake Canyon Allotment (see Map 1) to authorize cattle grazing in the jurisdiction of the Barstow Field Office. This allotment is located in rural San Bernardino County, southeast of the City of Barstow.

In September 2004 an environmental assessment (EA) CA-680-04-29 was completed to comply with IM 2003-071. This EA contains three alternatives for the renewal of this grazing lease.

As required under 43 CFR 4120.2(4)(c): BLM has provided an opportunity for public participation in the preparation of the above referenced EA. Chapters 1 and 2 of the EA have been provided to the interested public and the State of California. Copies of these chapters have also been provided to the U.S. Fish and Wildlife Service. Comments regarding this proposed action have been received from most of the parties contacted.

As required under 43 CFR 4130.2(b): BLM has consulted, cooperated, and coordinated with the interested public and the State of California concerning the renewal of this grazing lease. Comments regarding this proposed grazing lease renewal have been received from most of the parties contacted.

On January 29, 2001 the BLM and the Center for Biological Diversity et. al. enter into a stipulated agreement effective immediately, herein known as the “Settlement Agreement” for the management of livestock grazing under a federal court action. The Settlement Agreement prescribed areas of the Rattlesnake Canyon Allotment be excluded from cattle grazing in the spring and fall. In addition, it placed a stocking rates threshold of 541 AUMs for this allotment. These stipulations are still in affect until the signing of the Record of Decision for the West Mojave Plan Amendment to the CDCA Plan.

FINDING OF NO SIGNIFICANT IMPACT (FONSI)

Finding of No Significant Impact: Environmental impacts associated with the proposed action (current management) and alternatives have been assessed. Based upon the analysis provided in the attached EA, CA-680-04-29 (available at the Barstow Field Office) I conclude that the proposed action of the Current Management Alternative will have no significant impacts on the environment under the criteria in Title 40 of Federal Regulations Subpart 1508 and is not a major federal action. Preparation of an Environmental Impact Statement pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 is not required.

This action is in conformance with existing applicable state implementation plans for the maintenance and improvement of air quality and will not cause or contribute to any new or

increased violations of any air quality standards in the area. It does not exceed de minimus levels, is not regionally significant; and is exempt from conformity determination (40 CFR Part 93.153 (iii)).

FIELD MANAGER'S PROPOSED DECISION

Based on the analysis conducted in EA CA-680-04-29 and the FONSI, I have concluded that the renewal of the grazing lease for the Rattlesnake Canyon Allotment is appropriate. Therefore, it is my proposed decision to renew the grazing lease (#046803) for the Rattlesnake Canyon Allotment for a term of ten years. The terms and conditions for this authorization shall be the similar to the current grazing lease but slightly modified. The terms and conditions for this grazing lease are as follows:

The lessee shall continue to conform with the Settlement Agreement for grazing, effective January 29, 2001, as amended on April 25, 2002. This agreement excludes cattle use from portions of the allotment in the spring and fall. In addition, it placed a stocking rate threshold of 541 AUMs, as per the Field Manager's Final Decision issued September 7, 2001 (see Attachment 1). These stipulations shall remain in affect until the Record of Decision for the West Mojave Plan Amendment to the CDCA Plan is approved.

The lessee shall comply with the Area Manager's Decision dated October 2, 1981, and the Area Manager's Full Force and Effect Decision issued June 3, 1994.

The lessee shall comply with the Field Manager's Final Decision dated March 6, 1998. This grazing decision contains terms and condition from the March 25, 1997 biological opinion concerning livestock grazing in critical habitat for the desert tortoise. These terms and conditions are as follows:

- 1) Within key areas, utilization shall be limited to between 30 and 50 percent of key species. In desert tortoise habitat, utilization of key perennial grasses shall not exceed 40% from February 15 to October 14. No averaging of utilization levels among key species or key areas shall occur. When utilization approaches authorized limits in any key area, steps shall be taken to redistribute or reduce cattle or, where feasible, turning off water at troughs to reduce adjacent grazing.
- 2) Feeding of roughage, such as hay, hay cubes, or grains to supplement forage quality shall not be allowed in desert tortoise habitat.
- 3) Grazing shall be curtailed to protect perennial plants during severe or prolonged drought.
- 4) Except for shipping and animal husbandry practices, herding of cattle shall be kept to a minimum. Cattle shall be evenly dispersed throughout their use area.
- 5) In Category I and II desert tortoise habitat, perennial forage authorization above the preference level shall be made under temporary, non-renewable basis for one-month

increments from March 1 through June 1 depending on the availability of perennial forage. Outside of this period and in Category III habitat, authorization may be for up to three months depending on the number of head of cattle and forage availability.

6) No new or replacement waters may be constructed within 1/2 mile of Category I and II habitat, unless an overall benefit to the desert tortoise would occur. Such benefit(s) will be determined by BLM and subject to concurrence with USFWS through consultation under Section 7 of the ESA.

7) Authorization for ephemeral forage in Category III desert tortoise habitat shall occur only when 200 pounds per acre of ephemeral forage per acre is available. Authorization for ephemeral forage in Category I and II desert tortoise habitat shall occur only when 350 pounds per acre of ephemeral forage per acre is available. Any replacement cattle authorized to use ephemeral forage shall be removed from such allotments whenever the thresholds for curtailing ephemeral grazing are reached.

8) Cattle carcasses found within 300 feet of any road shall be removed and disposed of in an appropriate manner.

9) Construction, operation and maintenance of range improvement activities involving surface disturbance in desert tortoise habitat shall be conducted pursuant to the guidelines, limitations, and constraints outlined in a through j listed below:

a) Range improvement activities shall be limited to those proposed in the “***Biological Evaluation for Cattle Grazing in the Mojave Desert in the California Desert District***” (December 1991, available in the Barstow Field Office upon request).

b) The construction or re-construction of range improvements shall be conducted between October 15th and March 15th, unless otherwise authorized.

c) Range improvement projects shall be constructed and maintained according to standard environmental guidelines. Construction activities shall occur on previously disturbed sites, whenever possible. Environmental guidelines shall require that no known desert tortoise burrows be destroyed and that the chance of incidental or accidental take of desert tortoise is minimized.

d) Pre-construction desert tortoise surveys of proposed projects sites shall be conducted by a qualified biologist (“qualified biologist refers to a knowledgeable desert tortoise biologist, approved by BLM).

e) Motorized vehicle access to range improvements projects shall be confined to existing roads, unless otherwise authorized, and limits of all work areas shall be identified by flagging by a qualified biologist to minimize adverse impacts to desert tortoise and its habitat. All workers shall be instructed that their activities are restricted to flagged and cleared areas.

f) A field contact representative (FCR) shall be the lessee, or designated by the lessee, or a contractor who shall have the responsibility for overseeing compliance with the conditions of this decision. The FCR shall remain at the activity site during work periods and shall have the authority and responsibility to halt activities in violation of this decision.

g) Range improvement construction, operation, and maintenance shall be modified as necessary to avoid direct impacts to desert tortoise and their burrows. Potential hazards to desert tortoise that may be created, such as auger holes and trenches, shall not be left open while unattended. These hazards shall be eliminated prior to the work crew leaving the site at the end of each day.

h) If off-road use of any mechanical equipment is required to maintain or construct range improvement projects, the lessee or contractor shall notify the BLM two working days prior to initiating the work. During routine maintenance, vehicles shall be restricted to BLM approved routes of travel.

i) Surface disturbance shall be minimized, and after construction or maintenance is completed, disturbed soil shall be bladed and contoured into the surrounding terrain. Construction of new roads shall be minimized. Debris or trash created during construction and maintenance of range improvements shall be removed immediately to limit attraction of predators.

j) If desert tortoise are found above ground within areas to be disturbed by construction or maintenance of range improvements, the FCR shall be informed, activities shall cease and the Authorized Officer shall be notified. Handling of desert tortoise is prohibited except by a biologist so authorized by USFWS.

The terms and conditions of your grazing lease may be modified if additional information indicates that revision is necessary to conform with 43 CFR 4180.2(f)(1)(2)(see Attachment 2).

The lessee is required to perform normal maintenance on range improvements as per signed cooperative agreements and Section 4 permits.

The lessee is required to submit a certified Actual Use Report due 15 days after the end of authorized grazing use.

There shall be no motorized/vehicle use or changes in livestock use within the Bighorn Mountain Wilderness Area without prior authorization from the Field Manager.

If your payment is not received within 15 days of the due date you will be charged a late fee assessment of \$25 or 10% of the grazing bill, which ever is greatest no to exceed \$250. Failure to make payment within 30 days of the due date may result in trespass action.

The kind of livestock shall remain cattle/horses The permitted use for the Rattlesnake Canyon Allotment shall remain at 541 AUMs. The season of use for the Rattlesnake Canyon Allotment shall remain yearlong.

RATIONALE

Based on analysis from Environmental Assessment CA-680-04-29, the current grazing use on the Rattlesnake Canyon Allotment is required to remain under the grazing stipulations contained in the Settlement Agreement (2001), as amended on April 25, 2002 by court order until the Record of Decision for the West Mojave Plan Amendment to the CDCA Plan is approved. Future modifications to grazing use on the Rattlesnake Canyon Allotment would occur at that time.

AUTHORITY

The authority for this decision includes but is not limited to:

43 CFR 4120.2(4)(c): “The authorized officer shall provide opportunity for public participation in the planning and environmental analysis of proposed plans affecting the administration of grazing and shall give public notice concerning the availability of environmental documents prepared as a part of the development of such plans. The decision document following the environmental analysis shall be considered the proposed decision for the purposes of subpart 4160 of this part.”

43 CFR 4130.2(a): “Grazing permits and leases shall be issued to qualified applicants to authorize use on public land and other lands under the administration of the Bureau of Land Management that are designated as available for livestock grazing through land use plans. Permits and leases shall specify the type and levels of use authorized, including livestock grazing, and suspended use. These grazing permits and leases shall also specify terms and conditions pursuant to 4130.3, 4130.3-1, and 4130.3-2.

43 CFR 4130.2(b): “The authorized officer shall consult, cooperate, and coordinate with affected permittees or lessees, the State having lands or responsible for managing resources within the area, and the interested public prior to the issuance or renewal of grazing permits and leases.

43 CFR 4130.2(d): “The term of grazing permits or leases authorizing livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management shall be 10 years.”

43 CFR 4130.3-1(a): “The authorized officer shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock grazing carrying capacity of the allotment.”

43 CFR 4130.3-1(b): "All permits and leases shall be made subject to cancellation, suspension, or modification for any violation of these regulations or any of the terms and conditions of the permit or lease."

43 CFR 4130.3-1(c): "Permits and leases shall incorporate terms and conditions that ensure conformance with subpart 4180 of this part."

43 CFR 4130.3-2: "The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands."

43 CFR 4130.3-2(f): "Provision for livestock grazing temporarily to be delayed, discontinued or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives and applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth."

RIGHT OF PROTEST AND/OR APPEAL

If you wish to protest this decision in accordance with 43 CFR 4160.2, you are allowed fifteen (15) days from the receipt of this notice to file a protest with the Barstow Field Manager at the above BLM Office, 2601 Barstow Road., Barstow, California 92311.

In the absence of a protest within the time allowed in accordance with 43 CFR 4160.3(a), the above proposed decision shall constitute my final decision. Should this notice become my final decision, you may appeal this grazing decision for the purpose of a hearing before an administrative law judge in accordance with the regulations contained in Title 43 CFR 4.21, 4.470 and subpart 4160.3(f). Your notice of appeal must be filed with the Barstow Field Office Manager within thirty (30) days of the receipt of this decision at the above BLM Office, 2601 Barstow Road, Barstow, CA 92311. The appeal should specify clearly and concisely why you think this decision is in error. All reasons for error not stated in the appeal shall be considered waived and may not be presented at the hearing. Any failure to meet the thirty (30) day appeal deadline will bar you from challenging this decision.

If you wish to petition for a stay of this decision during the time that your appeal is being reviewed, the petition for stay must be filed within thirty (30) days of receipt of this decision to the above BLM office. If you request a stay, you have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay:

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- 1) The relative harm to the parties if the stay is granted or denied;

- (2) the likelihood of the appellant's success in the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) whether the public interest favors the granting the stay.

Sincerely,

Roxie C. Trost

Roxie C. Trost
Field Manager

Attachments 1 & 2

Map 1

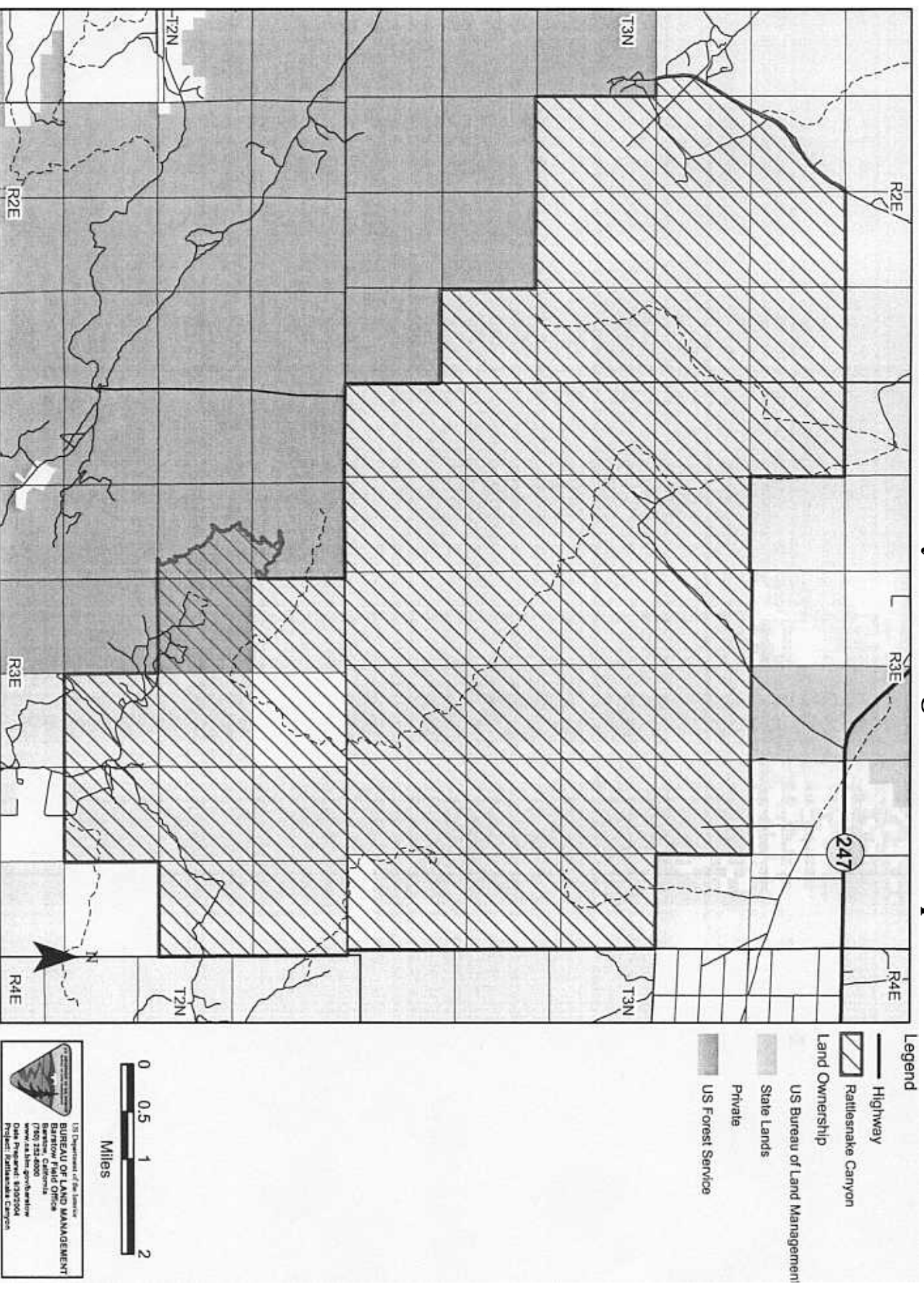
cc:

District Manager, California Desert

Interested Public of Record

California Dept. of Fish and Game

Rattlesnake Canyon Grazing Allotment Map 1



ATTACHMENT 1



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/BARSTOW



JAN 22 2002

A. O'Connell
1/22/02
R. C. [Signature]
01/22/02

IN REPLY REFER TO:
4160(P)
CA-680.36

VIA PERSONAL DELIVERY AND CERTIFIED MAIL NO. 70000520002518182849
RETURN RECEIPT REQUESTED

**NOTICE OF FINAL GRAZING DECISION
EFFECTIVE IMMEDIATELY AND
REVOCATION OF FINAL GRAZING DECISION
DATED SEPTEMBER 7, 2001**

Mr William Mitchell
32322 Hinkley Rd.
Barstow, CA. 92311

Dear Mr. Mitchell:

INTRODUCTION

This final grazing decision 1) modifies the terms and conditions of your grazing permit, modifies the way your livestock use the Rattlesnake Canyon Allotment, sets parameters for use, and establishes the period for this modification, and 2) revokes and vacates the September 7, 2001, immediately effective final grazing decision for the Rattlesnake Canyon Mountain Allotment. This final grazing decision is effective immediately.

ALLOTMENT INFORMATION

The Rattlesnake Canyon Allotment, #08003, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and established perennial forage allocation on a temporary non-renewable basis; however, total grazing use shall not exceed 541 AUMs. Your current lease, #046803, provides 541 animal

unit months (AUMs), equivalent to 45 head of cattle year-long on the Rattlesnake Canyon Allotment. The allotment encompasses 28,757 total acres, of which 1,925 acres are state or privately owned land and 26,832 acres are BLM-administered land. On BLM-administered land within the allotment, there are 12,800 acres of non-critical habitat for the desert tortoise.

FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY

Based upon communication between you and my staff, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3 (b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the modified area of seasonal exclusion within the Rattlesnake Canyon Allotment. It is my decision that the September 7, 2001 as it relates to the Rattlesnake Canyon Allotment is revoked, vacated, and replaced by this decision. As a result of discussions with you, I have determined that this final decision provides for more manageable livestock operations and boundaries of the exclusion area. Upon the issuance of this decision I will not authorize the fencing of the exclusion area boundary, however, if, through our compliance monitoring of the exclusion area boundary we determine that compliance is not being achieved, and the lack of fencing is the primary cause, and after consultation with you I will consider remedies such as temporarily fencing off livestock access to Dove Spring. In order to protect the desert tortoise and Parish's daisy and their habitats, this decision modifies the terms and conditions of your grazing permit, the way your livestock may use the Rattlesnake Canyon Allotment, establishes the period for this modification, and sets parameters for livestock use. This exclusion area comprises approximately 6,600 acres of desert tortoise non-critical habitat. This area is shown on the enclosed map. This area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. The permitted use for the Rattlesnake Canyon shall be temporarily reduced to 541 AUMs.

The livestock shall be excluded from Rattlesnake Canyon until the signing of the Record of Decision for the West Mojave Bio-regional Plan Amendment. The trailing of cattle through Rattlesnake Canyon shall not be permitted. The existing cattleguards and fencing shall effectuate this decision. These modifications on the Rattlesnake Canyon Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If, during the periods of exclusion, cattle are found in the exclusion area you will have 48 hours after notification from the BLM to remove them. If livestock are not removed within 48 hours, unauthorized use action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain unauthorized.

Applications received to graze during years of approved non-use on the Rattlesnake Canyon Allotment will be denied. No temporary non-renewable grazing permits will be issued for

This final grazing decision will be effective immediately and remain in effect until either, receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later.

In June, I would like to meet with you to discuss, assess, and evaluate the spring seasonal exclusion period. BLM will continue to work with you to assess and implement potential needed changes to this decision.

RATIONALE

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under the CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the

endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications to the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days.

Judge Sweitzer's August 24, 2001 Decision

After the hearings concluded, Judge Sweitzer issued his decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC) Through September 7

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney,

you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned through your attorney that you were not available to meet, we afforded you the opportunity to participate in a conference call on September 5 or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001, the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Barstow Field Office staff phoned you to inform you of the CCC workshop scheduled for September 6 and 7 in Barstow. On September 5, 2001, Barstow Field Office staff phoned and left messages with you, reminding you of the meetings scheduled on September 6 and 7 for CCC on your allotment. You did not attend the workshop on September 6 or 7.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter, it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision of August 24, 2001. The BLM telephoned you to determine whether they were available to participate in the meetings.

I contacted staff from the California Department of Fish and Game (CDFG) and California State Lands Commission about issuing a final grazing decision on this allotment. I explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After explaining there would be weekly field visits to the allotments, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Mr. Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, Public Employees for Environmental Responsibility, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7 in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The

Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier, who had been identified as a representative on behalf of the county attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

September 7 Grazing Decision, Appeal, and Stay Request

On September 7, 2001, I issued a "Final Grazing Decision, Effective Immediately." On September 10, I received a timely appeal and petition for stay from the Budd-Falen Law Offices, P.C. filed on your behalf. The petition for stay was forwarded to the Interior Board of Land Appeals (IBLA). Administrative Judge James Roberts granted the petition for stay on October 24. BLM filed a petition on October 31 requesting that the Director of Office of Hearings and Appeals (OHA) assume jurisdiction pursuant to 43 CFR 4.5(b) and review the October 24 order of the IBLA granting a stay of BLM's September 7 final grazing decisions. On November 29, 2001, OHA Director Robert S. More vacated the stay as to William Mitchell and Dave Fisher.

Continued Discussions with Lessee

During a November 29, 2001, phone conversation between you and Anthony Chavez, Mr. Chavez discussed with you the possibility of modifying the boundaries of the exclusion area to reduce the impact of the exclusion on your livestock operation. Mr. Chavez asked you to review a map BLM had developed with a modified exclusion boundary. Mr. Chavez asked you to consider BLM's modifications and encouraged you to submit any alternative proposals.

On January 7, 2002, staff and I phoned you. You indicated that any settlement would be presented through your attorney. You stated that a proposal from your attorney was forthcoming, and that this proposal represented your position regarding the September 7 final decision. On January 9, January 11, and January 15, 2002, BLM received proposals from your attorney.

Imminent Likelihood of Significant Resource Damage

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision, caused the BLM to make this decision effective immediately to ensure a spring and fall closure and eliminate trailing in Rattlesnake Canyon.

Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow,

California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) “The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations.” (Sweitzer Decision, 26)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Seasonal Exclusion

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. He stated: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Endangered Species Act Considerations

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or

irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Conclusion

Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101). Based on the foregoing as well as additional information found in the August 24, 2001 decision, hearing record, and testimony, BLM determined it necessary to issue this grazing decision on an immediately effective basis.

Finding of No Significant Impact

I have determined that this grazing decision would not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer’s decision of August 24, 2001. BLM has reviewed that EA, along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. In addition, BLM prepared EA-CA-680-01-15 that addresses impacts to the Parish’s daisy. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

AUTHORITY

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4120.3-1 (c): “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

43 CFR 4120.3-2 (a): “The Bureau of Land Management may enter into cooperative

range improvements or rangeland developments to achieve management or resource condition objectives. The cooperative range improvement agreement shall specify how the costs or labor, or both, shall be divided between the United States and cooperators(s).”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

RIGHT OF APPEAL

This decision is effectively immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant’s success on the merits;

- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,
TIM READ

Tim Read
Field Manager

cc: ✓ ~~Tim~~ Salt, District Manager
✓ ~~Daniel~~ Patterson, Center for Biological Diversity
✓ ~~David~~ Myers, The Wildlands Conservancy
✓ ~~Richard & Jackie~~ Balch
✓ ~~George~~ Walker, U.S. Fish and Wildlife Service
✓ ~~Becky~~ Jones, Calif. Dept. of Fish & Game
✓ ~~Jim~~ Martin, Calif. State Lands Commission
✓ ~~Ed~~ Layaye, County of San Bernardino

Enclosures:
Map

ATTACHMENT 2

National Fallback Standards for grazing allotments. Fallback standards were developed to implement 43 CFR, Subpart 4180 grazing regulations. The fallback standards for rangeland health are:

1. Upland soils exhibit infiltration and permeability rates that are appropriate to soil type, climate, and landform.
2. Riparian-wetland areas are in proper functioning condition.
3. Stream-channel morphology (including but not limited to gradient, width/depth ratio, channel roughness, and sinuosity) and functions are appropriate for the climate and landform.
4. Healthy, productive and diverse populations of native species exist and are maintained.

National Fallback Guidelines for grazing management. Fallback guidelines were developed in conjunction with standards to implement 43 CFR Subpart 4180. Guidelines identify 15 grazing management practices to achieve the fallback standards.

1. Management practices maintain or promote adequate amounts of ground cover to support infiltration, maintain soil moisture, and stabilize soils.
2. Management practices maintain or promote soil conditions that support permeability rates that are appropriate to climate and soils.
3. Management practices maintain or promote sufficient residual vegetation to maintain, improve, or restore riparian-wetland functions of energy dissipation, sediment capture, groundwater recharge and stream bank stability.
4. Management practices maintain or promote stream channel morphology (e.g., gradient, width/depth ratio, channel roughness and sinuosity) and functions that are appropriate to climate and landform.
5. Management practices maintain or promote the appropriate kinds and amounts of soil organisms, plants and animals to support the hydrologic cycle, nutrient cycle, and energy flow.
6. Management practices maintain or promote the physical and biological conditions necessary to sustain native populations and communities.
7. Desired species are being allowed to complete seed dissemination in one out of every three years (Management actions will promote the opportunity for seedling establishment when climatic conditions and space allow).
8. Conservation of federally threatened or endangered and other special status species are promoted by restoration and maintenance of their habitats.
9. Native species are emphasized in the support of ecological function.
10. Non-native plant species are used only in those situations in which native species are not readily available in sufficient quantities or are incapable of maintaining or achieving properly functioning conditions and biological health.

11. Periods of rest from disturbance or livestock use during times of critical plant growth or regrowth are provided when needed to achieve healthy, properly functioning conditions (The timing and duration of use periods shall be determined by the authorized officer).
12. Continuous, season-long livestock use is allowed to occur only when it has been demonstrated to be consistent with achieving healthy, properly functioning ecosystems.
13. Facilities are located away from riparian-wetland areas wherever they conflict with achieving or maintaining riparian-wetland function.
14. Development of springs and seeps or other projects affecting water and associated resources shall be designed to protect the ecological functions and processes of those sites.
15. Grazing on designated ephemeral (annual and perennial) rangeland is allowed to occur only if reliable estimates of production have been made, the BLM has established an identified level of annual growth or residue to remain on site at the end of the grazing season, and adverse effects on perennial species are avoided.